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Challenging the Strength of the Anti-Mercenary Norm

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Abstract

This article questions the prevailing view that a strong international norm exists against mercenary activity. We argue that more consideration needs to be given to international restrictions placed upon mercenaries that are the tangential expressions of more basic and pervasive international norms, namely those of state neutrality, the right of peoples to self-determination, and freedom of movement. To buttress our claim, we draw upon documentary evidence during the moments critical to the norm's growth; the Napoleonic Wars-1840, the Crimean War, and conflicts of national liberation in the de-colonisation era. The evidence suggests a broad indifference to mercenaries among policy makers during these critical periods. We conclude that the anti-mercenary norm is not as strong as its supporters suggest and is often marginalised when national interests dictate.

Introduction

Permeating the literature on mercenarism is the contention that the modern decline of mercenary activities is attributable to the development of a strong anti-mercenary norm at the international level (Percy 2007a; Percy 2007b; Percy 2014).[1] Implicit within this perspective is that mercenary opprobrium was generated by States, which restrict mercenary activity on the basis of moral objections. In particular, Percy (2007b, 121) claims that;

> The norm against mercenary use, *in particular the argument that mercenaries are morally undesirable because they do not fight for an appropriate cause*, is crucial to understand why states abandoned the use of foreign soldiers and took a great leap of faith in opting for citizen armies. As the concept of citizen duty to the state grew, and as patriotism and nationalism became *increasingly seen as desirable* and practical for armies, *a selfish and financial motivation became morally inappropriate* and practically inferior.[2] (Emphasis added)

In making the argument that the modern decline of mercenarism was propelled by a change in the normative environment, Percy highlights this moral objection as reflecting upon the identity and civility of the State (Percy 2007b, 121–23). Thus, her normative claim emphasises the overlapping moral shifts in the relationship between citizens and the State that together crowded mercenaries out of the armies of civilised nations (Percy 2007b, 165–66).

While we accept that the modern decline of mercenary activity was underpinned by a degree of moral reasoning, we argue that Percy has overstated its importance and overlooked the

[1] A 'strong norm' is more than just a matter of degree (strong or weak norm). Nor is it merely an adjective moderating 'norm', but is categorically different than simply 'strong' and 'norm'. It is unclear, however, what Percy means because she does not define 'strong norm'. She describes a 'strong norm' as a prohibitionary norm, but ascribe characteristics that set it apart from other weak/average norms. This indeterminacy makes it difficult to directly engage with her position.

[2] Percy conflates the purposes for which one fights (such as material gain) with the cause that one fights for (such as self-determination). The distinction is critical because one might fight for a just cause but for inappropriate purposes and vice versa. See Lynch and Walsh 2000. A different way of approaching this is that it is not evident that mercenaries should be phased out as a *means* of pursuing warfare because of shifting reasons to go to war.

impact of confluent international norms on mercenary decline.[3] We dispute that an anti-mercenary norm grew from only, or even predominantly, moral objections to the mercenary. We garner support for our claims from recently unearthed evidence that casts light upon different State motivations underpinning the transition away from mercenary armies. Our evidence is more consistent with Janice Thomson's claim that the decline of mercenarism resulted from the countervailing international norm that States should control non-State violence (Thomson 1990; Thomson 1994). While Percy rightly recognises the limitations of Thomson's argument that restrictions imposed on the supply of foreign military actors need not result in the suppression of the mercenarism phenomenon (Percy 2007b, 112–19), Thomson's logic excavates only one aspect of the argument we offer here. We present two complementary international norms; neutrality and the right of peoples to self-determination which also impacted mercenarism practices.

More concretely, while we accept an observable decline of mercenary activity during the modern era, we question suggestions that a specific international norm has crystallised against mercenarism *per se*. The historical record indicates two diverging impulses undergirding State initiatives to restrict mercenary activities that have been conflated by arguments about an anti-mercenary norm. In the first, States are seeking to limit the exodus of their citizens to participate in foreign armed conflicts through neutrality laws (European mercenaries in the 19th Century). In the second, States are attempting to curtail the influx of foreign military actors meddling with their internal affairs with appeal to the right of peoples to self-determination (mercenaries in the Congo and Angola). As support, we present archival evidence and consider formal regulation: with the expectation is that States would not seek to elevate minor or parochial concerns to the international plane, the latter may indicate the perceived seriousness or the level of generalisability of the issue facing the State.[4]

Dividing State responses to mercenarism highlights the fundamentally different interests that States were pursuing in efforts that restricted mercenarism. States supplying mercenaries objected to the practice on significantly different grounds than those in which mercenaries were operating. The divergence of State interests behind these efforts challenges the perceived unity of the international community in castigating mercenarism as morally repugnant. Thus, even if the international community were in unison in reprimanding mercenarism, this difference in their underlying rationale undermines the possibility of a unified *moral* objection.

We focus particularly on the periods covered by the Foreign Enlistment Bill (1819) to the Enlistment of Foreigners Bill (1854), and the period of African decolonisation. As Riemann has argued, the mercenary himself has been treated as a trans-historical figure even though the anti-mercenary norm is seen as socially constructed (Riemann 2016, 170). To limit the incongruity between treating the anti-mercenary norm as a social construct and the mercenary as an actor as an implicitly stable figure despite fluctuating historical circumstances, we focus

[3] Even with the strong formulation of the moral objections, Percy's quote above remains infused with instrumental reasoning; that citizen service was perceived as both being more efficient for States as well as being practically superior in the field.

[4] In the case of the UK government, it was thought the mercenary problem was a Congolese issue and therefore did not warrant legislation to resolve it, but should be dealt with as a local issue. See FCO 53/29 (13), FCO 53/68.

on the period after citizen armies had consolidated and cast mercenaries into their modern characterization.

If Percy is correct, the nature and strength of political responses against the use of mercenaries should have become firmly entrenched in European thought in the aftermath of the French and American Revolutions.[5] The periods we examine should be expected to uncover staunch political opposition and international outcry at the use of mercenaries but they do not. Instead, we find that in the period starting immediately after the Napoleonic Wars to the end of the first Carlist War in 1840 there was considerable mercenary activity in Southern Europe and South America which was unofficially supported by the governments of the United Kingdom and France (Rodriguez 2009; Rodriguez 2006). This activity did not generate the moral outrage that Percy might have expected, but instead concerns neutrality and the right of peoples to self-determination.

Indeed, anti-mercenarism results from competing logics in each of the periods we examine. Using empirical evidence from Hansard records of UK parliamentary debates surrounding 19th century foreign enlistment legislation, along with declassified official UK documentation covering mercenary activity in the Middle East and Africa during the 1960s and 1970s. While the United Kingdom was concerned about the moral hazards attached to the hiring of mercenaries, the evidence shows that these moral concerns were never sufficiently strong to prevent mercenary activity *per se.* Instead, the international norms of state neutrality and the right of peoples to self-determination played significant roles in restricting mercenary activity during these periods.

Framing the Theoretical Approaches

Mercenarism cannot usefully be analysed as a monolithic phenomenon, and to imbue it with features of stability and universality is to misunderstand its fluid and adaptive nature. As we discuss below, a significant factor that undermines the notion of a strong anti-mercenary norm is that it overlooks the different manifestations and diverging objectives of mercenary activity. Mercenarism is merely an instrument often utilised by political elites, as in the case of the Yemeni mercenaries (Jones 2004), or by governments, typified by the CIA's employment of mercenaries in the Congo. As such, it is evaluated according to its suitability and effectiveness for the relevant task (Michaels 2012).[6] Viewed from this perspective, assessing the merits and demerits of mercenarism in isolation will be unhelpful in understanding its characteristics, and misleading as to the conclusions drawn.

Instead, we propose that analyses of mercenarism need to be undertaken within the broader normative context, accounting for the content, direction and objective of other international norms and their relationship to the type of mercenary activity in question. The relevant international norms intersecting with mercenary activity are; the freedom of movement,[7] the principle of non-intervention,[8] and the right of peoples to self-determination.[9] We argue that

[5] We owe this point to Malte Riemann.
[6] Michaels argues that US policymakers were content to support a mercenary operation, considered as the best option to defeat the insurgency.
[7] Enshrined in Article 13 of the Universal Declaration of Human Rights (henceforth UDHR), and Article 12 of the International Covenant on Civil and Political Rights (henceforth ICCPR), UNGA Resolution 2200A (XXI) of 16 December 1966.
[8] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UN General Assembly Resolution 2625, 24 October 1970.

perceived restrictions to mercenary activity are only the tangential effects of these other international norms, and thus suggest that the form and intensity of the reaction to mercenarism can be predicted by the effect of these norms (Rosén 2008, 86-90), without recourse to a specific anti-mercenary norm.

We posit two axes along which regulation can be plotted to structure the challenge against the notion of an integrated and targeted international norm against mercenarism. First is the relative position of the regulator State; is the State seeking to curtail the outflow of its citizens, or is the State attempting to prevent foreign military actors from interfering in its internal affairs? Second is the formal level of the regulation; does the regulator State desire to govern for itself domestically, or is the aim to influence the international community?

It is important to distinguish between these impulses because their underlying interests diverge significantly. The primary concern of a State seeking to maintain its neutrality in relation to a foreign conflict is to prevent becoming embroiled in it, while the main aim of a State seeking to limit foreign interference is instead to deter and punish transgressors.

Normative Restrictions imposed upon sending-States

In *Corfu Channel*, the ICJ recognised as a 'general and well-recognised principle (…) every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States' (ICJ 1949, 22).[10] This obligation suggests that States should undertake actions to curtail the outflow of private military actors from its territory, provided that such activities would threaten the rights of other States. The position of the ICJ, however, cannot be construed to suggest that mercenarism would be internationally unlawful *per se*, precisely because of the qualifier that the relevant acts are those that operate against the rights of other States. Similarly, while '[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State' fall within the international legal definition of aggression,[11] it does not follow that all outflows of private military actors fall within this definition. The definition of aggression hinges upon two qualifiers; that the State possess agency and direction with regard to the forces which are sent by the State and that the acts of armed force are deployed against another State.[12]

Two inferences can be drawn; first that a simple nexus between a State or its territory and the outflow of private military actors does not necessarily contravene international law; and

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The International Court of Justice (henceforth ICJ) held that; 'The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference… the Court considers that it is part and parcel of customary international law', (ICJ 1986, para. 202). The ICJ has since reaffirmed this position (ICJ 2005).

[9] Article 1(1) common to the ICCPR and the International Covenant on Economic, Social and Cultural Rights (henceforth ICESCR), General Assembly Resolution 2200A (XXI), 16 December 1966.

[10] Article 1 of the Responsibility of States for Internationally Wrongful Acts (UNGAR 2002) provides that 'Every internationally wrongful act of a State entails the international responsibility of that State'. The International Law Commission cites *Corfu Channel* as a leading ICJ case establishing the principle (ILC 2007, II, Part II:32).

[11] Article 3(g), Definition of Aggression, United Nations General Assembly Resolution 3314 (XXIX), 14 December 1974, incorporated verbatim into Article 8 bis of the Rome Statute of the International Criminal Court, RC/Res.6, 11 June 2010 defining the international crime of aggression.

[12] While *Corfu Channel* does not have a sending requirement, it compensates by having a lesser threshold in stipulating 'acts contrary to the rights of other States' which appear to include action falling short of armed attack, and also by providing a knowledge standard.

second that even if one State is organising, directing or sending private forces to another State, that this is not necessarily repugnant to international law because those forces may not be deployed against or otherwise in a detrimental fashion to that state.[13] Hague V is instructive on the first point, where Article 4 stipulates that 'Corps of combatants cannot be formed nor recruiting agencies opened on the territory of a neutral Power to assist the belligerents'.[14] This codification implies that a State's neutral status would be unaffected where individuals leave on their own accord for foreign military service: the impugned actions are only those in which the State organises or assists in the formation of military units for foreign wars. The most obvious example of the second point is that an exodus of armed personnel which leaves one State in order to participate in the self-defence of another State is not obviously unlawful under international law. A strong and unified norm against mercenary activity exists would suggest that even such activity would be internationally objectionable. Instead, the operative principle here is that of non-interference, and restrictions imposed upon nominally non-State actors function to prevent the inter-State violence through private proxy.

Converging with this position are the national neutrality laws which are often cited as evidence of an anti-mercenary norm.[15] As the nomenclature suggests, these are pieces of domestic legislation enacted to maintain the neutrality of a State with regard to armed conflicts of which it is not a party. First instigated by the United States in the form of the 1794 Neutrality Act, it was subsequently mimicked by other States and thus globalised (Lobel 1983, 2. For the subsequent transnational spread of "neutrality acts", see Thomson 1994, 79–84. See generally, Layeb 1989). Transplanting such legislation into the mercenarism context, Janice Thomson (1994, 55) identified the essential question as to whether a State could retain a credible claim to neutrality when nominally private individuals leave its territory to participate in foreign conflicts. In a nutshell, is the mercenary to be understood as a political actor who engages the international responsibility of the State? We suggest that the development and proliferation of domestic neutrality laws serves primarily to limit State responsibility for private military actors leaving their territory, and that restrictions to their movement are incidental to this core objective of insulating the State from foreign conflicts. Furthermore, the popularity of such legislation is indicative of States seeking to limit their international liability rather than specifically curtail mercenarism.

The features of domestic neutrality legislation draw out these points, and we take the United Kingdom's Foreign Enlistment Act (FEA) 1870 as the exemplar.[16] The illegality of foreign enlistment for the purposes of the Act is characterised upon; the absence of sovereign permission; acquiescence to participate in the armed forces of another State; and that State is at war with a State on friendly terms to the United Kingdom.[17] Taken together, these features of the FEA imply that the United Kingdom is not legislating a broad repugnance of mercenarism (Committee of Privy Counsellors 1976, 7, para 24; the legal defects are detailed

[13] Examples of precisely this situation is provided in the conflicts of the early 19th Century where private force was deemed acceptable in promoting liberal ideas against absolutist monarchs.
[14] Hague Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land. 18 October 1907.
[15] Indeed, Percy (2007b, 115) herself criticises Thomson on this point in no uncertain terms; 'To call neutrality laws "anti-mercenarism legislation" is misleading, because it suggests that states were using neutrality law with the purposeful intent of eradicating mercenaries'.
[16] 33&34 Vict. Chapter 90, 9 August 1870. See below for a discussion of the debates surrounding the Act.
[17] Section 4. This and further Sections elaborate upon intention, or inducement of others, to join the armed forces of foreign States for similar purposes among restrictions of passage for such individuals.

at 7–10, paras. 26-39), but instead neatly curtails a very narrow category of private military activity. In essence, the Act only purports to restrict the embarkation of individuals who have designs to join the forces of a State engaged in conflict with States friendly to the United Kingdom. Important caveats exculpate the individual from the ambit of the Act; the permission of the sovereign, activities conducted outside of the armed forces of another State, and perhaps most significantly, if the martial objectives of the individual align with those of the United Kingdom and her allies.[18] Thus, the FEA needs to be understood as protecting the vital strategic and economic interests of the United Kingdom.[19] Thus, neutrality laws ensure that a State's own nationals do not undermine its own or its allies' interests through military activity.

Restricting the embarkation of individuals, however, causes friction with the freedom of movement norm which, as enshrined in Article 12(2) of the ICCPR, explicitly encompasses the unqualified individual right to leave any country. While neutrality legislation goes well beyond the requirements imposed by the principle of non-intervention by stipulating proactive measures aimed at preventing entanglements in foreign conflicts, rather than merely dictate that the State is not to be involved in the organisation and deployment of the force, it remains bounded by the imperatives of the freedom of movement. The pervasiveness of this norm limits the justifiable incursions made by countervailing interests which in part account for the specificity exhibited by neutrality legislation. Nowhere is this more obvious than in the case of the UK government's attempt to withdraw passports of individuals who wished to engage in, or who were returning from participating in, mercenary operations. While known mercenaries have had their passports withdrawn, notably in 1961, 1968 and 1974, such an approach was viewed as unlikely to be an effective deterrent and very difficult, if not impossible, to administer.[20] Given the human rights dimensions of revoking an individual's passport, it would have been a controversial move for Parliament that would have opened the government to criticism of implementing arbitrary restrictions upon travel (FCO 45/1889). As one parliamentarian objected to the Foreign Secretary that, 'while (…) the grant[ing] or withdrawal of a passport is within the prerogative of the Foreign Secretary, this is a power that has been very rarely used, and should (…) be used only with the greatest of circumspection' (FCO 45/1889). The same parliamentarian compared the practice with that of Communist countries that refused their citizens passports and which the UK government strongly deplored (FCO 45/1889).[21]

A strong anti-mercenary norm would be expected to converge with the thrust of neutrality legislation to carve greater inroads against the individual right of free movement, but we find little supporting evidence. The overriding interest of States enacting neutrality legislation was to stay out of foreign wars, and not to restrict the flow of private military actors. Thus, despite numerous occasions on which the UK FEA 1870 could have been applied, it is telling that it

[18] In the contemporary context, this alignment of PMSC contractors with the interests of Western powers may account for the relative ease with which the industry functions.
[19] This was the case after President Lincoln announced the Union's intention to blockade the ports belonging to the Southern states in April 1861where upon the British government took the opportunity to proclaim its neutrality to protect important economic interests with both belligerent parties. See (Arielli, Frei, and Hulle 2016, 7–11).
[20] See CAB 148/112, FCO 53/29, FCO 38/319 for details about why passports were withdrawn.
[21] For a brief commentary, see Percy 2007b, 195-98.

has never actually been relied upon in litigation.[22] Thomson (1997, 84) had suggested that the increasing number of States imposing restrictions upon their citizenry in relation to foreign military service led directly to a decline in availability of armies for hire internationally, which in turn accounted for the observable decline in mercenarism. But as Percy (2007b, 112, quoting Avant 2000, 67, footnote 112) accurately observed, however, '[f]or Thomson to be right, "we should see countries trying to buy mercenaries and failing; but there is little evidence of this phenomenon"'. Thomson's conclusion concerning the decline of mercenarism may have missed the mark, but it provides further evidence of the freedom of movement norm in play. That there is no evidence of supply shortages, combined with the fact that neutrality legislation is rarely, if ever, used in prosecutions together suggest that States were not concerned at restricting the outflow of their nationals to foreign conflicts. Furthermore, the freedom of movement norm created difficulties even for States which had an interest in suppressing the foreign military service of their nationals, which would account for the continuity in supply that Avant (2000, 67, footnote 112) observed.

Normative Restrictions Imposed upon Receiving-States

The existence of an anti-mercenary norm can more readily be deduced from the reaction of States upon whose territory these activities occur. The expectation is that receiving-States[23] will have a strong interest in minimising the adverse impacts of foreign military actors on the State's domestic activities, and to do so by the means of deterrence and punishment. In this regard, recourse to the criminal law is unsurprising for the simple reason that many of the activities constituting mercenarism would independently satisfy domestic penal provisions. The drive for criminalising mercenarism is thus predictable, but arguably superfluous, because the legal tools for prosecution are largely in place. Indeed, while the status of being a mercenary and association with such individuals may arguably constitute aggravating factors, determining such status is both convoluted and controversial. The thrust of criminalisation initiatives, however, must necessarily remain confluent with State interests, and this constitutes a significant challenge for the existence of an anti-mercenary norm. Even States affected by mercenarism only prohibit very specific forms of mercenarism, generally leaving open the possibility for bolstering their own military ranks with mercenaries.[24]

The influence of the right of peoples to self-determination, enshrined in Article 1(1) common to both the ICCPR and the ICESCR, and the prevailing notion in the 1960s and 1970s that mercenarism frustrated this process of decolonisation complicates this picture.[25] The strength of the international norm of self-determination can be deduced by its prime position in the International Covenants. Thus, the implication is that the appearance of an anti-mercenary norm in this period may only be the mirage of the stronger right of self-determination. If this

[22] See CAB 148/112, cabinet paper on the mercenary problem for a detailed explanation of the Foreign Enlistments Act 1870.
[23] Terminological note; 'receiving' does not imply consent or acquiescence, but instead reflects the actual presence or occurrence of mercenary activity on the territory of a State.
[24] Contract fighter pilots used by the Nigerian state during the Biafra war (FCO 65/362), for example.
[25] The British government's policy towards Africa at the time was one of non-intervention and neutrality. The government may have feared foreign fighters becoming involved with the rebels in places like Rhodesia where the government was attempting peaceful transfer of power to majority rule. This accounts for government support for an international convention banning mercenary recruitment into rebel armies, while retaining State rights to recruit foreign fighters. See DEFE 24/1349 and DEFE 24/1759.

is the case, it should be possible to demonstrate that the objections to mercenarism go only as far as can be justified to prevent conflict with self-determination.

The UN Economic and Social Council (1986/16) were explicit about the perceived threat mercenarism posed to self-determination in;

> Condemn[ing] the increased recruitment, financing, training, assembly, transit and use of mercenaries, as well as other forms of support to mercenaries (…) *for the purpose of destabilizing and overthrowing* the Governments of southern African States and *fighting against the national liberation movements of peoples struggling for the exercise of their right of self-determination*. (Emphasis added).

The motivation to stymie mercenarism as a means of fostering the right of peoples to self-determination is apparent in the Preamble of both international Conventions addressing mercenarism. In the Organisation of African Unity Convention for the Elimination of Mercenarism in Africa (henceforth OAU Convention, OAU 1977), the Preamble speaks of 'the grave threat which the activities of mercenaries present to the independence, sovereignty, security territorial integrity and harmonious development of Member States of the Organization of African Unity' and the 'threat which the activities of mercenaries pose to the legitimate exercise of the right of African People under colonial and racist domination to their independence and freedom'. In a similar vein, the United Nations General Assembly (1989) was motivated by an awareness 'of the recruitment, use, financing and training of mercenaries for activities which violate principles of international law such as those of sovereign equality, political independence, [and] territorial integrity of States and self-determination of peoples'.[26]

In subsuming mercenarism within the threat posed to the right of peoples to self-determination and the political stability and territorial integrity of the State, the international legal position essentially adopts the status of mercenary as a heuristic: the mercenary is synonymous with insurrection and human rights violations. The image of the mercenary embodies disparate threats. As such, the label 'mercenary' possesses predominantly rhetorical value, which is engaged for its pejorative and stigmatising effect, and which operates as an aggravating factor that merits additional punishment. If this is correct, however, the objection to mercenarism is instrumental, and not intrinsic to the status, further eroding the claim of an independent anti-mercenary norm.

The OAU and UN Conventions confirm the instrumental objection to mercenarism, and can be collapsed into the concern to safeguard the political stability of States and the right of peoples to self-determination.[27] Article 1(2) of the OAU Convention (1977) stipulates that 'The crime of mercenarism is committed (…) with the aim of opposing by armed violence a process of self-determination stability or the territorial integrity of another State' (see also, Ballesteros 2003, para. 39). Similarly, Article 2(a) of the UN Convention (UN General Assembly 1989) defines as a mercenary persons 'specially recruited (…) for the purpose of participating in a concerted act of violence aimed at [o]verthrowing a Government or otherwise undermining the constitutional order of a State (…) or [u]ndermining the territorial

[26] Henceforth 'UN Convention'.
[27] Neither instrument objects to mercenarism *per se*.

integrity of a State'.[28] If mercenarism were universally objectionable on moral grounds and expressed as a specific international norm, the expectation would be that mercenaries and their associates would be unequivocally condemned for their intrinsic qualities, and without qualification.[29] Yet, it is difficult to extract expressions of opposition to mercenarism where such activities are not directed at undermining the constitutional order or territorial integrity of States and which are unrelated to the right of peoples to self-determination. The most that can be concluded is that OAU and UN Conventions criminalise very narrow manifestations of mercenarism where these converge with the interests of national stability and the right of self-determination: as such, these constitute an expression of those norms.

Further eroding the contention that mercenaries are morally objectionable is their legal definition as non-State actors. If the core mercenary characteristics are his motivation to fight by the desire for material gain, his foreign character in relation to the conflict, and his specific recruitment to fight in a particular conflict (van Deventer 1976, 813–14, summing up the definitional debates for Article 47 of API), it is not immediately obvious why he should suddenly be exculpated by alignment with the State.[30] If the moral objection to the mercenary is intrinsic to his qualities, why should either the cause for which he fights or the status of his employer factor into the moral calculus?

Along similar lines are the formalistic distinctions drawn by Article 47 of Additional Protocol I (henceforth API) governing international armed conflicts. As the UN Special Rapporteur on Mercenaries Enrique Ballesteros (2003, para. 38) stated; 'Given its nature as an instrument of international humanitarian law, the Protocol does not legislate on mercenaries themselves, but on their possible involvement in an armed conflict'.[31] Yet, only mercenaries who participate in an international armed conflict suffer the disadvantage imposed by Article 47, which has no counterpart in Additional Protocol II that regulates non-international armed conflicts (Liu 2015). This differential treatment of mercenaries undercuts the claim of a strong and universal condemnation of mercenaries which would necessitate symmetrical treatment regardless of the status of the armed conflict. It should be observed that Article 47 does evince some condemnation of mercenaries who were historically accorded prisoner-of-war status upon capture (Kwakwa 1990, 85), with some reports even indicating that suspected mercenaries received preferential treatment (Cotton 1977, 151, note 44). Yet, this reversal of historical practices does not go as far as might be expected of a strong international norm because Article 47 merely denies mercenaries of the right to be a privileged combatant rather than denying that status outright (ICRC 1987, para. 1795).

That international law proscribes mercenarism only in certain contexts and prohibits the use of mercenaries towards specified ends provides a strong challenge against the existence of a strong international norm against mercenarism. Percy (2007a) argues that the flaws pertaining to the international law on mercenaries evinces the faithfulness of States to the principles

[28] Note that this definition is narrower than that in the OAU Convention, and that its concern is protecting the stability of the international order.
[29] It has proven extremely difficult to convincingly distinguish the mercenary on moral grounds. See Lynch and Walsh, 2000.
[30] Under the formalistic legal definition, a mercenary employed by a State is an oxymoron because this nexus would immediately exclude him from the purview of that definition.
[31] As such, like Percy's (2007b, 115) own critique of Thomson's identification of neutrality law as anti-mercenary legislation, it would be inappropriate to characterise Article 47 of API as a measure deployed against mercenaries *per se*.

underpinning the anti-mercenary norm. A shallow challenge compares the low ratification rates[32] for the broadly international UN Convention (UN General Assembly 1989)[33] with the relatively high adoption rates for the regional OAU Convention (OAU 1977).[34] This relative difference in uptake suggests that mercenarism was an important issue in the African context, where mercenaries were active and perceived to frustrate the right of peoples to self-determination, but not for the broader international community.[35] Our deeper challenge pertains to Percy's (2007a, 381-86) assertion that it was the conflicting norm of State responsibility that caused State reluctance in the context of the UN Convention. It is unclear from the text of the UN Convention that it imposes criminal responsibility upon the State;[36] this is in clear contrast to the terms of the OAU Convention which provides for the possibility of a State itself committing the crime of mercenarism.[37] Considering the broader international context of the law of State responsibility, a State is only responsible for internationally wrongful acts of non-State entities where that person or entity is 'empowered by the law of that State to exercise elements of governmental authority' or where 'the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities'.[38] Taken together, the low international ratification rate espoused in the UN Convention indicates a certain level of apathy in relation to mercenary activities. The norm conflict to which this was attributed appears at closer inspection not to be applicable.

The Historical Context of the International Conventions Against Mercenarism

The international reaction to mercenaries was sparked by the United Nations experience in the Congo in 1961 (ICRC 1987, para. 1789). The UN, however, did not raise a moral objection to the mercenary activity, but rather focused upon the destabilising effects of foreign military personnel in the civil war. Thus, the focus of the Security Council Resolution (UNSCR 161 1961) was 'the immediate withdrawal and evacuation from the Congo of all Belgian and other foreign military and para-military personnel (…) not under United Nations Command, and mercenaries',[39] with 'mercenaries' seemingly inserted as an afterthought. But

[32] The low ratification of the UN Convention by States, particularly Western States, might be explained as an outcome of the UN definition, which could affect persons wishing to serve in the armed forces of another country. While an exception was ultimately carved for individuals who are members of the armed forces of a party to the conflict, the potential curtailment of a State's freedom of recruitment remained a significant concern. The UK was concerned about jeopardising access to Commonwealth countries and Ireland to fill the ranks of its armed forces. At the Geneva Conference, the British delegation was briefed to oppose any proposed definition of a mercenary which would include any member of an armed force under the control of the government. This insight might apply to other countries also seeking to protect their right to recruit foreign citizens into their military. See DEFE 24 17/59.

[33] The ICRC database indicates 31 State parties and 14 State signatories.

[34] The ICRC database indicates 34 State parties and 9 State signatories.

[35] A minor point could also be made that a strong anti-mercenary norm would compel States to ratification, even if the Convention itself proved unwieldy or ineffective, to signal support for the position.

[36] Articles 2-4 stipulate offences for the purposes of the UN Convention related to *persons*. This suggests that the UN Convention establishes individual criminal responsibility for the activities stipulated within the document. While later Articles set forth State obligations under the UN Convention, these are phrased in terms of refraining from engaging directly with mercenarism, for establishing mechanisms for punishing the impugned actions, and for cooperation and coordination in these regards.

[37] Article 2 (OAU 1977) provides; 'The crime of mercenarism is committed by the individual, group or association, representative of a State *and the State itself* (…)'. Emphasis added.

[38] Articles 5 and 8 respectively. UNGAR 56/83 2002. A/RES/56/83.

[39] Interestingly in the context of the previous section, this Resolution continued by urging States to prevent the departure of such personnel from their territories.

the focus of the UN on foreign military personnel indicates that the object of scorn is not the mercenary, but rather the interference of foreigners more broadly in a raging civil war.[40]

The specific international legal provisions specifically targeting mercenaries was the 1976 Luanda Trial in the wake of the Angolan civil war.[41] This narrow historical and geographical context is critical because it questions whether the objection to mercenarism is generalisable, and generally acceptable, to the international community. A pointed problem persists, however, in the Luanda Trial itself in which the Angolan authorities were criticised for having prosecuted and convicted thirteen mercenaries without legal basis.

George Lockwood (1976, 198-99), a Canadian member of 'an International Commission of Enquiry on Mercenaries' convened by the Angolan government to observe the trial, noted that the principal charge was the crime of being a mercenary, and yet 'it would undoubtedly be difficult to argue convincingly that the crime of being a mercenary was part of the law of Angola'. After analysing Angola's operative laws at the time of the Trial, Mike J. Hoover (1977, 340) concluded that substantive due process had been breached because there was no domestic legislation criminalising the impugned activities that the defendants were accused of committing. Hoover (1977, 339) concluded that 'At the time of their arrests, the defendants had not violated existing Angolan law except arguably laws forbidding illegal entry, kidnapping, murder, and robbery. Callan and McKenzie were the only two charged with murder. None of the others was even charged with these crimes'.[42] This led Hugh Byatt (1976), the official British observer, to condemn the Luanda trial as a show trial conducted for political purposes (see HC Deb, Vol 915, cc 44-9 for the British response).

Robert Cesner, the chief defence council for the American defendants, and John Brant (1976, 354-55) concurred, drawing attention to the additional support provided by the Draft Convention on the Prevention and Suppression of Mercenarism which recognised the need for legislation to control mercenary activity. They too highlight the problem of insufficient legal footing for the convictions, but also extrapolate to the peril 'as to the propriety in following the mercenary trial as a legal precedent' because no State 'can create precedent by its own acts which are contrary to existing law' (Cesner and Brandt 1976, 355). Implicit is their concern that the Luanda Trial will be heralded as a legal precedent for the criminal status of mercenaries and the criminalisation of mercenarism more broadly. While the Luanda Trial does not serve as direct precedent as such, it became the catalyst driving forward the conclusion of international agreements which curtailed the rights of mercenaries and which put mercenary activity on a criminal stance. To underscore the international legal position shortly after the conclusion of the Luanda Trial, the Diplock Report concluded that '[t]o serve as a mercenary is not an offence under international law'. (Committee of Privy Counsellors 1976, 10).

[40] UNSC Resolution 169 of the 24th November 1961 (S/5002) states as policies and purposes of the United Nations with respect to the Congo (Leopoldville) to include '(d) To secure the immediate withdrawal and evacuation from the Congo of all foreign military, paramilitary and advisory personnel not under the United Nations Command, and all mercenaries'.

[41] The Luanda Trial was unique; a similar case concerning an acknowledged mercenary was undertaken in Sudan, but the trial proceeded upon specific violations of the law, Cesner and Brant 1976, 351–52. See also, Hoover 1977, 336–38.

[42] Indeed, the Luanda Trial and its outcome underscore the concern that mercenaries may in fact be vulnerable individuals in need of protection, Fraser 2013.

Situated within this context, the subsequent drive to criminalise mercenarism arguably seeks to compensate for the embarrassment sparked by the Luanda Trial by pushing for the development of a firm international legal basis for subsequent prosecutions. Yet, the distinctly African interest in pursuing this initiative is evident not only from the OAU Convention for the Elimination of Mercenarism in Africa, but can also be deduced from the comparatively low ratification of the UN Mercenary Convention. The outgrowth of anti-mercenarism sentiment from events at the conclusion of the Angolan civil war underscores the partial and parochial interests from which the international reaction blossomed.

Historical Evidence: European Mercenarism during the First Half of the 19th Century

We now turn to consider the historical evidence challenging the notion that an anti-mercenary norm is the outcome of moral objections to the mercenary. It is necessary at this point to reassert Riemann's (2016) thesis that the mercenary is not a trans-historical figure, but rather an identity forged at the turn of the 19th century and tempered against the consolidation of the citizen army as the benchmark of organising violence. Our aim in the following sections is begin a process of reorienting mercenary discussions to the appropriate historical period in which the mercenary emerged as a distinct actor with stable and identifiable characteristics on the international stage.

The archival and documentary evidence indicates the continued support for mercenaries among many United Kingdom parliamentarians during the first half of the 19th century. This support, however, was often tempered with the State's need to remain neutral in times of war.[43] From an instrumental perspective for objecting to mercenaries, a large section of the parliamentary evidence will show that if the interest of the home State was not affected by the desire of its citizens to wage war on behalf of another State, or revolutionary movement against another foreign State, then the citizen was free to follow such a course of action provided that such action converged with State interests. Only when there was misalignment of home State interest and the action of its citizens were objections triggered. Thus, while the parliamentary debates show mixed feelings towards mercenaries, many parliamentarians supported them provided they fought in the defence of liberty (Hansard HC Deb 13 May 1819 vol 40 cc362-74; Hansard HC Deb 03 June 1819 vol 40 cc867-910; Hansard HC Deb 10 June 1819 vol 40 cc1084-116; Hansard HC Deb 11 June 1819 vol 40 cc1118-25).[44]

The focus on the role of the United Kingdom is justified because her national interests were global and, as in the case of secessionist movements in Southern Europe and South America, were often concerned with supporting liberal causes against absolute monarchies. As long as mercenaries fought in support of the former, the United Kingdom would not intervene (Rodriguez 2009, 409). As Dakin's (1955) assessment of Greece makes clear,

> The Governments of France and England, far from looking with entire disfavour upon their nationals who went to Greece as volunteers, welcomed to

[43] This was the reason the United Kingdom signed the Treaty of Friendship and Alliance with Spain on the 5 July 1814. See Hansard HC Deb 16 March 1815 vol 30 cc226-8. Also see Wentzell 2014.
[44] As many as 50,000 British North American's enlisted in the Union Army many to fight in the cause of freedom. See Wentzell 2014

> a certain extent their activities and certainly connived [with] them to an extraordinary degree.[45]

Consequently, mercenaries played a vital role in advancing the liberal cause at a time when the United Kingdom was still recovering from the effects of the Napoleonic Wars. They were, in this respect, favoured over the use of regular soldiers by the government, even though there were Parliamentarians who disliked the whole idea of relying on them. This latter group supported the concept that 'warfare [was] something that could only be honourably fought by someone with a personal stake in the matter' according to Percy (2007b, 122). The shift away from mercenaries, therefore, cannot be interpreted solely in terms of a moral abhorrence against them, for while questions about their use were being asked in Parliament the evidence against them in favour of a citizen army is simply not conclusive enough.

The most important event that shaped the United Kingdom's attitude towards mercenaries in the first half of the 19th century, and which ultimately dictated the government's response to mercenary activity, was the Treaty of Friendship and Alliance with Spain (Hansard HC Deb 16 March 1815 vol 30 cc226-8). The treaty effectively obliged the government to introduce the Foreign Enlistment Bill (Hansard HC Deb 13 May 1819 vol 40 cc362-74) that '[gave] the country the right that every legitimate country should have, to prevent its subjects from breaking the neutrality existing towards acknowledging states, and those assuming the power of states'. The Bill was introduced in 1819 but attempts were quickly made to repeal the Bill in 1823 and 1833. The reason in 1823 was because it was not thought necessary to protect the country's neutrality in war (Hansard HC Deb 16 April 1823 vol 8 cc1019-58), and in 1833 because according to Mr John Murray (Hansard HC Deb 06 August 1833 vol 20 cc381-9) 'there was never an Act of legislation so little in accordance with the general opinion of the country'. As Wentzell (2014, 62) points out, 'his opinion was hardly unique' among Parliamentarians. The final event we examine to understand the United Kingdom's position on mercenaries during this period were the debates on the Enlistment of Foreigners Bill held in 1854 (HL Deb 14 December 1854 vol 136 cc253-91 253, HL Deb 15 December 1854 vol 136 cc344-72 344, HL Deb 16 December 1854 vol 136 cc415-21 415, HC Deb 19 December 1854 vol 136 cc507-618 507). It is at this point that parliamentarians began to morally object to the hiring of foreign soldiers. Their reasons, however, suggest little desire to establish an anti-mercenary norm. Instead, they point to the national interest lying at the heart of those objections, and in particular the need for a national army similar in size and design to the national armies of France and Prussia, according to Avant (Avant 2000).

Returning to the House of Commons debates on the Foreign Enlistment Bill 1819, it is clear that support for the Bill was not unanimous (it passed the House of Commons by only 13 votes, Wentzell 2014, 61) and there were strong objections to the idea of a prohibition on the purchase of mercenaries because it prevented British subjects who were disposed to fight in support of liberty, according to Mr Denman (Hansard HC Deb 03 June 1819 vol 40 cc867-910). As Sir James Mackintosh (Hansard HC Deb 13 May 1819 vol 40 cc362-74) noted it was 'a bill for preventing British subjects from lending their assistance to the South American cause, or enlisting in the South American service'; continuing, he also argued that the Bill was 'an enactment to repress the rising liberty of the South Americans, and to enable Spain to re-impose that yoke of tyranny (…) which they had nobly shaken off, and from which, he trusted in God they would finally be enabled to free themselves'. Nor was Sir James

[45] Quoted in Rodriguez 2009, 409.

Mackintosh alone in expressing such sentiments. Mr Ellice (Hansard HC Deb 13 May 1819 vol 40 cc362-74), also supported 'the cause and object of the people of South America' who wished to free themselves from tyranny. Nevertheless, it was Colonel Davies (Hansard HC Deb 13 May 1819 vol 40 cc362-74) who in the end summarised the feelings of so many parliamentarians towards the Bill when he stated that,

> he was convinced that his [Honourable] friends who spoke against the measure, expressed the sentiments of nine-tenths of the people of the United Kingdom. Were we, whose boast it was to value freedom, and whose duty it was to extend its influence in every part of the globe, to sacrifice our character by restraining the efforts of those patriots in rescuing themselves from bondage imposed on them for centuries? If the real object was neutrality, let the restriction as they affect Spain, be repealed altogether, and let it be open to the people to give their service to whichever party they pleased.

Such feelings as expressed against it did not disappear and as we mention above, two attempts were made to repeal the Bill in 1823 and 1833 because it was felt the law was unnecessary and unjust. In the first instance, such sentiment was expressed by Lord Althorp (Hansard HC Deb 16 April 1823 vol 8 cc1019-58) in the House of Commons debate in 1823 when he argued that as long as no man acts to inconvenience or injure the community, and that he had proved on this account that the restriction was needless, then he had proved also that according to the principle of our free constitution, the Bill ought to be removed. In the second instance, some, such as Mr John Murray (Hansard HC Deb 06 August 1833 vol 20 cc381-9) who moved to bring in a Bill to repeal the FEA, felt it to be unjust,

> because it was the natural right of every man, when his country did not want his service, or could not employ him, to carry his industry, his skill his talent, and his arms, into the service of a foreign country which might want his assistance.

Finally, what of the Crimean War? It is only at this point that the debates on the Enlistment of Foreigners Bill take on a moral viewpoint. Importantly, however, it is not one based upon a general dislike for mercenaries since many chose to fight in defence of liberty in Southern Europe and South America after the Napoleonic Wars (Rodriguez 2009; Rodriguez 2006). The objection to using mercenaries was more closely related to their inappropriateness as a strategic tool to protect the country's geostrategic interests, and not the idea that allowing Englishmen to fight by the side of mercenaries is bad for morale (Hansard HC Deb 19 December 1854 vol 136 cc507-618). These objections were real concerns to parliamentarians, but they were also contested by those who supported the government's decision to hire mercenaries to support its Crimean Campaign. Mr Adderley (Hansard HC Deb 19 December 1854 vol 136 cc507-618) summed up the first concern about their inappropriateness as a strategic tool in this situation by succinctly noting that, 'such a measure could be only justifiable in the most urgent case of necessity', and then pointed out that the urgent need to employ mercenaries had not been made. This position stands in stark contrast to Mr Watson (Hansard HC Deb 19 December 1854 vol 136 cc507-618), who supported the need to use mercenaries because he felt bound to support the government and 'if the government told him on their responsibility, sanctioned by the Commander-in-Chief, that the army required the support of foreign troops, not by substitution, but as auxiliaries, he

would at once give the government his support, and he felt that he would be backed by the whole people of England in so doing'. Finally on this point, Mr Watson (Hansard HC Deb 19 December 1854 vol 136 cc507-618) also felt 'that troops taken from Germany would be much sooner efficient troops than levies of English lads of eighteen or twenty' a point supported by other parliamentarians. Strategic concerns guided Parliament's decision to use mercenaries.

What then of the other objections? Numerous parliamentarians felt that hiring German mercenaries was unacceptable: not fighting to the right reason, they were thought to abandon their post immediately when danger arose. Such objections, however, do not touch the essential characteristics of mercenarism. Rather the lynchpin of the grievance is whether the cause pursued is just.[46] As other parliamentarians argued, the Crimean War was a European war, not a solely British and French war, and therefore all Europeans had just cause to fight Russia. As Lord Russell (Hansard HC Deb 19 December 1854 vol 136 cc507-618) explained, 'what we have always contended for in this House, and what I believe this House concurred in (…) is that we have embarked in a great European quarrel for the sake of the liberties of Europe' (…) in which every German, every Swiss, and every other inhabitant of Europe ought to take as great an interest as any Englishman'. Thus, many in Parliament believed it was acceptable to hire German mercenaries because German citizens had as great an interest in pursuing the war as any Englishman. Various parliamentarians also felt such mercenaries posed a moral hazard to British soldiers who would not want to fight next to them.[47] This was the position held by the Earl of Ellenborough (Hansard HC Deb 14 December 1854 vol 136 cc253-91) who argued that 'you are to some extent endangering [their] moral character by placing beside them, and in connection with them, troops for whose moral character you have no security'.[48] He (Hansard HC Deb 14 December 1854 vol 136 cc253-91) did not mean to say that German troops hired as mercenaries did not make respectable soldiers under good officers, but that they were not equal to British and French soldiers. His position, however, was fiercely contested by others who sought to protect the reputation of foreign soldiers. Notable among them was the Duke of Richmond and the Earl of Derby (Hansard HC Deb 14 December 1854 vol 136 cc253-91) who both felt that those who had served in the King's German Legion during the last war did so with equal distinction to any British soldier. Beamish concurred, highlighting the loyalty, bravery and effectiveness of the Legion and stating that, 'The *King's German Legion* was without doubt amongst the very best troops commanded by Wellington in the Peninsula and at Waterloo' (Beamish 1832-37). The idea that mercenaries were unworthy soldiers who presenting a moral hazard to the citizen soldier was simply untrue by the time of the Crimean War. The debate instead was more nuanced, with many parliamentarians continuing to embrace the good mercenary in part because of the strategic and economic benefits they conferred.

[46] For the argument that 'There is no reason to believe that there cannot be mercenaries who only participate in just wars', see Lynch and Walsh 2000, 141.

[47] Such opinions as held by parliamentarians often did not reflect the opinions held by many British officers and soldiers who had served with Prussian and Austrian troops in particular. See Wishon 2013.

[48] Lord Ellenborough was a keen supporter of organising a militia to supply the army with the recruits it needed, instead of relying on foreign soldiers. Empirically, there is no basis to Ellenborough's statement, which probably had more to do with his attempt at politicking to gain an advantage over the government. Beamish (1832-37) has documented the bravery of German troops who served under Wellington.

Those arguing in favour of an anti-mercenary norm often overlook the full picture about mercenary activity during the 19th Century: the mercenaries fighting against absolute powers in the wars of succession and civil wars in Southern Europe and South America (Rodriguez 2009; Rodriguez 2006); the 50,000 who joined the Union Army; those who fought in defence of the Papal State, and in the ten year War in Cuba (1868-1878) (Wentzell 2014) come to mind. Our claim is not that moral objections did not exist or that they were not valid during this period, but rather that such objections were subordinated to political, strategic and economic interests. As the evidence above points out, Parliamentarians offered three different, but convincing, opinions in favour of allowing mercenary activity to continue. First, it was unjust to deny them employment. In this respect, an individual had a right to serve in the forces of a foreign government, provided that such service did not compromise the neutrality of his country. Second, mercenaries were an effective strategic tool for promoting national interests at minimum financial cost to the government (Mohlin 2012). Third, prohibiting them through an Act of Parliament was unnecessary provided that they did not harm the national interest. As the next section examines, it was not until mercenaries started to undermine the right of peoples to self-determination that objections to mercenary interventions began to take hold among member states of the international community.

Documentary Evidence: Mercenary Activity in the Civil Wars of Yemen, the Congo and Angola (1962-1976)

As we argue in the introduction, the notion of an anti-mercenary norm is anchored upon specific historical periods and geographical regions, and this is particularly evident in the case of the Cold War, with Africa from 1960-1976 as the intellectual focus.

This final section challenges the factual basis of this focus by examining newly identified archival material about mercenary activity during the Cold War for the first time, as well as re-examining other documentary evidence. A complex picture emerges where governments use mercenaries to support their national interests on the one hand, but condemn them on the other hand if their activities fail to align with national interests. These interests were either narrowly focused on preserving influence in a region, or widely focused on the promotion of international norms as in the case of non-intervention. Unfortunately, in the context of mercenary activity, these norms often collided with each other, leaving governments' discretion to choose depending on the exigencies of each particular context.

Yemen

One of the least discussed mercenary operations concerning the anti-mercenary norm is the mercenary operation in the Yemen from 1962-65, which Percy (2007b) completely ignores. To date, the only academic book that gives a concise account of the operation from the UK government's perspective is Jones's *Britain and the Yemen Civil War, 1962-1965* (2004). It is difficult to account for the near absence of this civil war from the literature, but one reason may be that little is known about it. A more plausible explanation is one of framing: how we conceive of mercenaries and what we imagine a mercenary to be like. Consequently, the Yemeni mercenaries stood in opposition to the general conception of 'the mercenary' and hence were not recognised as such. They may have been airbrushed out of the anti-mercenary norm debate because their purpose, behaviour and motives do not correspond with the stereotypical image of the mercenary epitomised by the Congo and Angola operations during the 1960s and 1970s.

The first point to note about the Yemeni mercenary operation is who organised it and why. The operation was organised by members of the British government, whose intentions differed significantly to those who organised the mercenary operations in the Congo and Angola. The organisers were, to quote Jones (2004, 5), 'individuals associated with influential pressure groups, both inside and outside government, [who] were, at crucial stages, able to usurp the recommendations of the mandarins in King Charles Street'. These individuals included, in particular, Julian Amery, who became Minister for Aviation and was Harold Macmillan's son-in-law, and Lt Colonel Neil 'Billy' McLean.[49] When the overthrow of Yemeni's Imamate, with the support of Nasser, threatened to spill over into the Federation of South Arabia, they believed the future prosperity of Britain was now threatened by Nasser's hegemonic ambitions and that it also served to strengthen Moscow's hand in the region. Amery, McLean and their supporters acted to undermine any attempt by the government to recognise the new socialist government in Sana'a, a recognition strongly advocated by the Foreign Office (Jones 2004, 19). Instead, they chose to support a mercenary operation to protect what they saw as a national interest in maintaining Britain's influence in the region against an expansionist Egypt. Bernard Mill (in Jones 2004, 4), a former Special Forces officer who took part in the mercenary operation, succinctly summed up the reasons behind this course of action:

> At this particular time (…) British governments had lost the will in some ways to engage in this sort of [clandestine] operation and we could do something the British government no longer had the will to do, help to get rid of a foreign power in Yemen. *So it was logical for private enterprise to pick up this particular bill, particularly as we felt it was important for the British national interest*. (Emphasis added).

The last sentence is particularly revealing and leads us nicely into the second point, which is what motivated the mercenaries to participate and how they behaved. As Mill explained, both their intentions and their actions differed from those of the mercenaries who operated in the Congo and Angola. First, their goal was not just monetary but rather to protect Britain's interests in the region (also see Smiley and Kemp 1975, 155). Secondly, they were handpicked and usually Special Forces trained, while those who served in the Congo and Angola were recruited via adverts in newspapers and often lacked the military discipline and training. The other reasons for choosing mercenaries were to do with the 'legacy of Suez [which] imposed severe limitations on the extent to which Britain could resort to the overt use of force' (Jones 2004, 86), in the region, and the government's inability to generate a force quickly enough using either Special Forces or agents.

Condemnation of mercenaries is usually based on the mercenary's financial motivation and his lack of moral justification for killing.[50] These objections did not necessarily apply with the Yemeni mercenary operation because civil servants, Ministers, parliamentarians and private individuals inside and outside government took diverging views on the merit of using mercenaries for the operation. Some thought it was the only viable option if UK vital interests were to be protected, while others took the opposite view, in that the operation was unlikely to change the situation on the ground in favour of UK in the long-term. Hence, a strong

[49] The operation, though, did not receive official UK or French government support. See CAB 148/112.
[50] For a sustained challenge to even these objections. See Lynch and Walsh 2000.

objection to using mercenaries, particularly from the FCO, was met with equally strong support for the idea. Moreover, given the diverging views expressed on the Yemeni operation, it is hard to argue that mercenary operations *per se* are vilified. Even the Israeli government lent support to the mercenaries, and in exchange gained valuable intelligence about the capability and limitations of Egypt's air force that proved invaluable during the 1967 war (Hart-Davis 2012, 157, 328–29). Saudi Arabia and Kuwait also benefitted from the operation in that Nasser's reputation and influence on the Arabian Peninsula was severely damaged, and he no longer posed a real threat to British interests in the region. Ultimately, motivation and justification are important factors in evaluating the morality of using mercenaries. Focusing upon pecuniary motivation collapses the complexity of the relationship between the mercenary and government, the purposes behind that relationship, and the interests it is designed to protect, thereby oversimplifying the analysis.

Thus, the final section examines this relationship its transformation to hostility when purposes and interests diverge. To contextualise this situation, we analyse the impact of mercenaries on the struggles for independence in the Congo and Angola, the two conflicts at the root cause of our contemporary objection to mercenaries.

Unlike their early 19th Century predecessors, who fought in defence of freedom with the tacit approval of the governments of British and France, the mercenaries that plagued Africa throughout the 1960s and early 1970s fought in frustration of the consolidating right of peoples to self-determination. Simultaneously, the majority of narratives over the last fifty years are overly simplistic, failing to grasp the political and strategic complexities and purposes behind the use of mercenaries by different governments and political movements in the Congo and Angola. The consequence is that most explanations of contemporary mercenary phenomena are too focused on particular events. These explanations also lack credibility by failing to explicate the precise reasons behind why mercenaries became embroiled in the Congo and Angola. In particular, most explanations ignore the interests of the Superpowers, some European governments and the newly established Congolese government which the mercenaries helped to secure. Thus, while these governments publically objected to the presence of these mercenaries, they often supported their presence privately because they directly benefitted from these activities.[51]

Congo

The presence of mercenaries in the Congo from 1961 to 1968 cover three distinct periods, during which time they were accused of destabilising the country, helping to save it from the Simba Revolt, and finally rebelling against Mobutu's government. The literature, however, is focused on their role in helping the attempted Katangese secession from the Congo from 1961 to 1963.[52] This period ignited the international community's condemnation towards the modern mercenary, who was seen to support Tshombe and his ambition for an independent Katanga; an ambition that probably received the support of the Union Minière,[53] which some alleged financing of the mercenaries (Mockler 1985, 80–81). Such ambition was contrary to

[51] A paper prepared on the mercenary problem in 1970 by the FCO indicated strong arguments on both sides of the debate. See CAB 148/112.
[52] Indeed, the Commentaries to API note that "The problem of mercenaries was first raised at the United Nations in 1961 in connection with the Katangese secession", ICRC 1987, 572.
[53] The Union Minière du Haut Katanga (UMHK) was a Belgian mining company operating in Katanga It was created on October 28, 1906.

US policy which tied US support to the Adoula government and to Katangan reintegration (Foreign Relations of the United State, 1964-1968, Volume XXIII, Congo 1960-1968, United States Government Printing Office, Document 119). The US government were so concerned with the situation in Katanga that it seriously considered assigning troops to United Nations Operation Congo (UNOC) unless Katanga agreed to terms with the Congolese government and submit to UN decisions (Ibid). As the following telegram from US Secretary of State Dean Rusk to the US Embassy in Belgium pointed out 'not only is Congo key to central Africa, but also chronic instability provides fertile grounds for Communist infiltration, prevention of which has been cornerstone our Congo policy last four years' (Ibid, Document 197). It is not surprising therefore that mercenaries became entangled with US interests, given the role they played in the Katangese attempt at independence. While it was also seen as an expression of the right to self-determination, the US fear was that the Congo could become communist-aligned, and might trigger a cascade, making an independent Congo the US's principal interest in the region. Nor is it surprising that the reputation of the Congolese mercenaries as imperial lackeys working for the highest bidder was sealed given their support to such a venture.

Then, in one of the most extraordinary twists in the politics of the Congo, Tshombe, after being appointed Prime Minister of the Congo in June 1964, immediately invited the mercenaries back to help put down a Simba Revolt[54] in the eastern part of the country. As Michaels points out, it was 'at the instigation of Washington and Brussels, [that] Tshombe began hiring a mercenary force to bolster the ANC's counter-insurgency efforts' (Michaels 2012, 134). In public, the US government sought to distance itself from the mercenaries due to concerns about the damaging implications of possible press reports that the US was helping mercenaries kill Africans in order to protect European interests (Michaels 2012, 138-39). Meanwhile privately, the relationship that eventually emerged was covert and effective, with CIA analysts lavishing praise upon Mike Hoare in particular (Michaels 2012, 138-139). Ultimately, the mercenary operation was a success that helped to ensure the Congo remained within the Western sphere of influence. Even so, Tshombe remained unpopular among the other African leaders because of his use of white mercenaries (Michaels 2012, 149), many of whom came from South Africa and Rhodesia and were considered to have very conservative, even colonialist political sympathies (Foreign Relations of the United States, Document 511). He was eventually replaced as Prime Minister making it easier for Congo's neighbours to drop their support for the rebels.

Then, on July 4th 1967 approximately 160 white mercenaries, along with Katangese troops, mutinied, causing a political headache for Mobutu's government and the governments involved in their evacuation. Even so, some UK government departments still did not think mercenaries in general posed a serious long term threat to the country's interests. As Dale from the FCO's South East Asia Department noted 'our interest in the subject is marginal; the problem of mercenaries in South East Asia is not itself serious enough to warrant legislation' (FCO 53/29 (13)). These sentiments were echoed in other departments that thought the problem should be dealt with on a geographical basis (FCO 53/29 (11) (12) (13)). In another

[54] The Simba Revolt began in the Congolese Eastern province of Kwilu and lasted from December 1963 to November 1965, organised and led by Pierre Mulele, Gaston Soumialot, and Christophe Gbenye. The Simba threat to Tshombe's government gained the support of the Soviet Union, China and Cuba, thus fuelling the perception in Washington that a Vietnam-style domino effect was likely to succeed in the region if the revolt continued. See Michaels 2012, 134.

FCO communication from the Central African Department the Legal Advisers made it clear that in order to show a need for legislation it was necessary to show the mercenary problem was not simply a Congolese problem (FCO 53/68).

The question of whether to legislate against mercenaries climaxed with the release of OPDO (70) 1 paper on the mercenary problem by the FCO on the 5th January 1970 (CAB 148/112). The paper concluded that new legislation to deal with the problem would be controversial, unlikely to be effective, potentially embarrassing to administer, but attractive externally, ultimately concluding against legislative action at that time (CAB 148/112). The paper was later discussed by the Cabinet Working Party on Powers to Control the Recruitment of Mercenaries and the Export of Goods and Services on the 18th May 1970 (CAB 130/458). The Chairman's opening statement acknowledged the committee's general endorsement of the paper's conclusion to the effect that new legislation to control the recruitment of mercenaries was unlikely to be advantageous (CAB 130/458). Finally, the government's reluctance to contemplate new legislation banning mercenarism was therefore based on the idea that such legislation would be ineffective and at the same time act to limit the rights of the individual (FCO 25/111 (14)), and not moral opprobrium concerning mercenary motivation or conduct.

Angola

Angola sealed the fate of the mercenary as someone who could not be trusted to safeguard the interests and values of their home state. Many in the UK expected that the government would restrict or ban the profession after the evacuation of the Congo mercenaries. Yet, there was a 'marked lack of interest about the subject in Whitehall except on the part of the then Prime Minister Harold Wilson and Cabinet Secretary Sir Burke Trend' (FCO 46/556 (19A)). The government's view then, was that the 'balance of advantage was against further legislation at the present time' (FCO 46/556 (19A)). After the Angola debacle, however, it might have been expected that the government would change tack and restrict or ban mercenaries. But even after numerous discussions between the same government departments that were involved with resolving the Congo mercenaries debacle, the government still chose to do nothing. This should not be surprising given that little had changed legally and contextually regarding the mercenary question since the evacuation of the Congo mercenaries in 1968. Furthermore, the arguments against banning mercenaries put forward then were still considered relevant by the government in 1976-77.

The main report into the issue this time was the Diplock Report (Committee of Privy Counsellors 1976). The report was discussed at a meeting held by the Group on the Diplomatic Report on Mercenaries on the 20th July 1976 where it was agreed by the Group 'that the main recommendations of the report (points 6 and 7 of the summary of the conclusions) should be recommended to Ministers' (CAB 164/1373(8)). However, it was also noted that both recommendations should be read in conjunction with sections 13 and 14 of the report, but in particular the first paragraph of section 13, which records the three propositions to which the committee attach most weight; 'that it is not practicable or just to try and define an offence of enlistment as a mercenary by reference to motive; that a penal prohibition on what an individual does abroad involves a restriction of liberty which could be justified only on compelling grounds of national interests; and that the practical difficulty of providing such an offence would mean that there could be very few successful prosecutions'

(CAB 164/1373 (13)). Furthermore, in the case of withdrawing a passport as an administrative means of controlling the movement of mercenaries it was considered unjustifiable and 'needed to be considered in a wider context than that of the enlistment of mercenaries' (CAB 164/1373 (10, Annex 3)). It was also noted that 'it was something [removing a passport] which they would not wish to rely on in the future' (CAB 164/1373 (8)).

Finally, the government's attitude towards the Angolan mercenaries need to be contextualised in relation to its Southern African foreign policy because this accounts for why geo-strategically the UK government was strongly opposed to the mercenary intervention. Unlike the Yemen operation, which had unofficial support from members of the government, this group of mercenaries were recruited largely as a result of a private initiative financed by the CIA and without Whitehall knowledge or acquiescence (Hughes 2014, 8-10). Furthermore, Whitehall officials felt that 'any embroilment alongside Washington DC and Pretoria would be counterproductive for Western interests' (Hughes 2014, 10). This was particularly so for the UK, which at the time was trying to negotiate an end to the Rhodesian civil war. Furthermore, Whitehall recognised that support for a CIA backed mercenary operation might provoke the Soviets to support the three liberation movements fighting the Smith regime. Such a move would not only undermine Whitehall's political initiatives to end the war peacefully, but might lead to the Soviets competing with the UK over geostrategic interests and influence in the region. From the perspective of the UK government, it therefore did not make geo-strategic sense to support the mercenaries.

Conclusion

Despite the observable decline of mercenarism coinciding with an apparent repugnance expressed by the international community, we have interwoven theoretical explanations with empirical evidence, that demonstrate inconsistencies with the notion that a strong international norm exists against mercenaries. In challenging Percy's argument, we have deliberately focussed upon the historical periods and events that she and other proponents of the anti-mercenarism norm have based their claim in order to illustrate other catalytic factors that do not turn upon a mercenary-specific norm. We have then supplemented these accounts with largely overlooked historical episodes from the literature because we believe they failed to fit the image of mercenary activity, but which further erode support for an international norm against mercenarism.

While we do not discount moral objections to mercenaries completely, the revised picture becomes one that is dominated by the primary tones of neutrality in the international arena, the right of peoples to self-determination, and the narrow interests of States during periods of international instability, with the UK as the lead example. We have sought to demonstrate that the expression of these factors can account for much of the observations put forward by the proponents of the anti-mercenarism norm, and we suggest the anti-mercenary norm is not as strong as its supporters suggest and, moreover, is often marginalised when national interests diverge from its tenets.

Given the widely accepted difficulties of defining a mercenary, the lack of international support for the instruments that curtail mercenarism, and the persistence of private military services proffered for profit in contemporary conflicts, we present this body of evidence to ground a broad reappraisal of the purported anti-mercenarism norm. In so doing, we hope to

reopen the question of mercenary decline for investigation and to foster different perspectives that seek to account for the observed trends. Finally, there is the question of continued relevance for the purported mercenary-specific norm, when considered in the context of new developments such as the emerging foreign fighters debate. By advancing a broader framework that accounts for international reaction to privately organised armed actors more generally, we hope to sketch the contours for further research beyond the mercenarism phenomenon. As such, we hope that this article has re-opened this area for a broader and more comprehensive debate that takes into account contemporary developments.